No. 88-1850

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

SEVENTY-TWO THOUSAND NINE HUNDRED AND FORTY DOLLARS IN UNITED STATES CURRENCY AND TERRY TOWNSEND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal from a judgment of forfeiture because the forfeited property was no longer under the control of the court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. F36-F37) is unpublished, but the decision is noted at 860 F.2d 1080 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1988. A petition for rehearing was denied on February 10, 1989. Pet. App. G38-G39. The petition for a writ of certiorari was filed on April 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 13, 1986, petitioner Townsend carried $72,940.00 in currency in a bag as he passed through a security checkpoint in the Memphis International Airport.

Tr. 16, 73, 81-82. Townsend was on his way to Miami, Florida. *Id.* at 17. The currency was detected when the bag passed through an X-ray machine. *Id.* at 42-43. Law enforcement agents then approached Townsend, talked with him, and seized the $72,940.00, suspecting that the money was related to drug transactions. *Id.* at 13-15, 35.

Townsend filed a motion under Fed. R. Crim. P. 41(e) for the return of the money. On October 15, 1986, however, the government filed this civil forfeiture action against the property under 21 U.S.C. 881. Townsend answered the forfeiture complaint and filed motions to exclude the evidence and to place the money in an interest-bearing account. Pet. 9-10.

Following a bench trial in the United States District Court for the Western District of Tennessee, the district court entered a judgment of forfeiture in favor of the government and against the currency. The judgment, which was entered on May 2, 1988, stated: "The subject property is forfeited to the plaintiff United States and is to be disposed of in accordance with law." Pet. App. B30. Townsend filed a notice of appeal from the judgment of forfeiture, but he did not move to stay the district court's judgment. On June 1, 1988, the U.S. Marshal for the Western District of Tennessee transferred the $72,940.00 from the custody of the Marshal to the Federal Reserve Bank for deposit into the General Treasury Account. See Declaration of Aug. 26, 1988, attached to Gov't C.A. Motion to Dismiss for Lack of Jurisdiction.

2. On October 5, 1988, the government moved to dismiss Townsend's appeal for lack of jurisdiction. On October 25, 1988, the court of appeals granted the government's motion. The court stated: "Because the property has been released from the control of the court, we lack jurisdiction over this appeal." Pet. App. F36-F37.

ARGUMENT

Petitioners contend (Pet. 12-22) that the court of appeals erred in dismissing his appeal for lack of jurisdiction. That contention is without merit.

1. It is well settled that civil forfeiture proceedings are in rem actions. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). A court's jurisdiction over a forfeiture action depends upon the court's control over the property. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269, 272 (1917). For that reason, the courts of appeals consistently dismiss appeals where a judgment of forfeiture was entered and the prevailing party lawfully executed the judgment, thereby by taking the property from the court's control. In order to preserve the res pending appeal, a claimant must seek a stay of execution on the judgment, file a supersedeas bond, or otherwise ensure that the judgment will not be enforced and the res removed from the control of the court. See *United States* v. *One Lear Jet Aircraft, Ser. No. 35A-280*, 836 F.2d 1571, 1573 (11th Cir.) (en banc), cert. denied, 108 S. Ct. 2844 (1988); *United States* v. *$2,490.00 in U.S. Currency*, 825 F.2d 1419, 1420-1421 (9th Cir. 1987); *United States* v. *$79,000 in United States Currency*, 801 F.2d 738, 739-740 (5th Cir. 1986); *United States* v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 716-717 (7th Cir. 1975).

Here, the district court ordered the $72,940.00 forfeited to the government. Petitioner failed to seek or obtain a stay of that judgment. The money was then transferred from the control of the district court to the United States Treasury. Hence, the court of appeals correctly held that

the district court, and consequently the appellate court, no longer had jurisdiction over this action.

2. Petitioner Townsend does not seriously dispute that the transfer of the property from the control of the district court destroyed in rem jurisdiction. See Pet. 13. Townsend contends (*id.* at 13-14), however, that the court of appeals continued to have personal jurisdiction over the government and him. Townsend bases his claim on the fact that, prior to the filing of the forfeiture action, he filed a Fed. R. Crim. P. 41(e) motion for the return of seized property. Townsend's contention is not persuasive.

The judgment from which petitioners appealed (see Pet. App. 34-35) was the final judgment in the civil forfeiture action brought under 21 U.S.C. 881. It was that judgment that resulted in the forfeiture of the $72,940.00, and it was that judgment that petitioners needed to stay in order to ensure that the property would remain within the jurisdiction of the court. Petitioner Townsend's separate motion for return of the property played no role in this forfeiture action and it was not subsumed in the judgment of forfeiture. Thus, Townsend's separate Rule 41(e) motion did not give the court of appeals an independent basis of jurisdiction over the appeal in the forfeiture case.

3. Contrary to Townsend's contention (Pet. 15-19), the judgment below does not conflict with the decisions of other courts of appeals. In *United States* v. *Wingfield*, 822 F.2d 1466 (10th Cir. 1987), cert. dismissed, 108 S. Ct. 1762 (1988), the district court possessed property that was claimed both by the Internal Revenue Service and the County of Boulder, Colorado. The district court ordered the property given to the IRS, and the County appealed. The Tenth Circuit held that it had jurisdiction over the County's appeal even though the property had already been given to the government. The court reasoned that it had in personam jurisdiction over the government and

could, under Section 7426(b) of the Internal Revenue Code (26 U.S.C.), order the government to pay a money judgment equal in value to the subject property. See 822 F.2d at 1471-1472. Here, there was no analogous legal ground in the appeal before the Sixth Circuit on which the court of appeals could have relied to order the government to pay $72,940.00 to petitioner Townsend if the court had determined that the judgment of forfeiture was improper.*

Townsend relies primarily (Pet. 15-17) on three cases from the Fifth Circuit. Those cases, however, are clearly distinguishable. In *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977), the court of appeals asserted jurisdiction because the plaintiff mortgagee brought its action both in rem against a ship and in personam against the ship's owner, and because the ship's mortgagee, seeking to recapture a part of another creditor's recovery, had also appealed. In *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978), the court held that it had jurisdiction over the government's appeal despite the absence of the res because the government intervened, stipulated to in personam jurisdiction, and filed a counterclaim that had a jurisdictional basis independent from the res. And in *United States* v. *An Article of Drugs Consisting of 4,680 Pails*, 725 F.2d 976, 984 (5th Cir. 1984), the court of appeals heard an appeal in a case brought under the Food, Drug, and Cosmetic Act even though the subject property was beyond the court's control because "[t]he substantive character of the remedy

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* Petitioners' reliance on *Trans-Asiatic Oil Ltd., S.A.* v. *Apex Oil Co.*, 804 F.2d 773 (1st Cir. 1986), is also misplaced. The court of appeals there held that it had jurisdiction over a case despite the fact that the property in issue had been released, because the prevailing party had earlier waived any jurisdictional objection.

sought in this case [was] not forfeiture." In the context of a true in rem forfeiture action such as this—where a judgment was not entered against Townsend but against the property—the Fifth Circuit has joined the other circuits in holding that the court's loss of control over the res destroys jurisdiction. See *United States* v. *$79,000 in United States Currency*, 801 F.2d 738 (5th Cir. 1986) (appeal dismissed in forfeiture action where $79,000 was paid to the U.S. Customs Service after the claimant did not obtain a stay of the judgment).

4. Lastly, petitioner Townsend contends (Pet. 20-21) that the court of appeals erred in dismissing his appeal without considering whether the $72,940.00 was released accidentally, fraudulently, or improperly. There is no basis for petitioner's claim that the transfer of funds was improper. The money was transferred to the United States Treasury after the government obtained a judgment in its favor from the district court and petitioner failed to obtain a stay pending appeal. The release of the money was therefore entirely proper. See *United States* v. *One Lear Jet Aircraft, Ser. No. 35A-280,* 836 F.2d at 1574 n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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